

75CV4669-55-MO

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BASHIRU NAKARE INUFELE,

Petitioner,

95 CV 4669 (SJ)

-against-

UNITED STATES OF AMERICA,

MEMORANDUM
AND ORDER

Respondent.

-----X
A P P E A R A N C E S:

BASHIRU NAKARE INUFELE
BOP Reg. No. 41578-053
Big Springs Correctional Center
3700 Wright Avenue
P.O. Box 3470
Big Springs, Texas 79721
Petitioner Pro Se

ZACHARY W. CARTER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
By: Alan B. Vickery
Assistant United States Attorney
Attorney for Respondent

JOHNSON, District Judge:

Bashiru Nakare Inufelee ("Petitioner" or "Inufelee"),
appearing pro se, has filed a petition for a writ of habeas
corpus pursuant to 28 U.S.C. § 2255. Inufelee sets forth
three claims in his petition: (1) his Fifth Amendment right
not to be placed in double jeopardy was violated by an
administrative forfeiture of \$1,000; (2) his right not to
be placed in double jeopardy has also been violated
because, as a deportable alien, he inevitably faces a
second prosecution and imprisonment term for the same

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offense in Nigeria; and (3) his Sixth Amendment right to effective assistance of counsel was violated when his counsel advised him to "abandon his trial defenses and plead guilty," Amended Brief in Support of Movant's Motion Under 28 U.S.C. § 2255 at 2, and when his counsel failed to raise the double jeopardy issues on appeal. For the reasons stated below, Petitioner's motion to vacate, set aside, or correct his sentence is denied.

BACKGROUND

Upon his arrival at John F. Kennedy International Airport on November 18, 1992, Inufeke, a native Nigerian, was arrested when officials discovered approximately two kilograms of heroin secreted inside his shirt. In a statement made after his arrest, Inufeke disclosed that he had entered into an agreement in which he consented to smuggle the heroin into the United States in exchange for \$10,000. He also indicated that the \$1,000 found on his person at the time of his arrest was a down-payment on the total amount he was to receive in accordance with that agreement.

Initially, Inufeke was indicted on two counts, for importation of heroin and possession of heroin with the intent to distribute. Each of those counts carried a mandatory minimum prison sentence of ten years. The

Government, however, subsequently offered him a plea agreement, allowing him to plead guilty to only one count for which he would receive only a five-year prison term, the minimum sentence allowable by law. The agreement also required him to forfeit his right to move for a downward departure from the applicable sentencing guidelines range. Inufeles accepted the provisions of the Government's plea agreement.

At the time of Inufeles's arrest, Government officials seized \$1,000 in United States currency from his person. The currency was turned over to the Drug Enforcement Administration ("DEA") for forfeiture as proceeds from drug transactions. Following appropriate statutory procedures, the DEA commenced administrative forfeiture proceedings against the currency. Although the Government provided Inufeles with two opportunities to submit a timely, properly executed claim, he failed to cure the defects in his claim within the time allotted. Consequently, the DEA issued a Declaration of Forfeiture pursuant to 19 U.S.C. § 1609. After several unsuccessful attempts by Inufeles to have the currency returned, this Court ultimately denied his motion for return of property and dismissed the action on December 12, 1995. See Inufeles v. United States, No. 95 Civ. 5314 (E.D.N.Y.) and United States v. Inufeles, No. 92 Cr. 1310 (E.D.N.Y.).

DISCUSSION

I. Double Jeopardy.

A. Administrative Forfeiture Proceeding.

Inufele first claims that his criminal conviction violated his Fifth Amendment right not to be placed in double jeopardy because of the February 1993 administrative forfeiture proceeding. Although Petitioner bases his argument on several Supreme Court decisions, see United States v. Halper, 490 U.S. 435 (1989), Austin v. United States, 509 U.S. 602 (1993), and Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994), the Court has recently stated that "nothing in Halper, Kurth Ranch, or Austin purported to replace our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause." United States v. Ursery, -- U.S. --, 116 S. Ct. 2135, 2147 (1996) (emphasis added). The Court recognized that an in rem civil forfeiture may still violate the Double Jeopardy Clause, however it pointed out that such violations occur only in cases "where the 'clearest proof' indicates that an in rem civil forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding" Id. at 2148 n.3 (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 (1984)).

Petitioner has failed to provide any evidence to suggest

that the forfeiture proceeding in his case was so punitive in form and effect as to render it criminal. See id. at 2148. "[T]he fact that a forfeiture statute has some connection to a criminal violation is far from the 'clearest proof' necessary to show that a proceeding is criminal." Id. at 2149.

B. Deportation Proceedings.

Inufele also asserts a double jeopardy claim based, in part, on his status as a deportable alien. Contrary to his contention, however, the fact that he may face a term of imprisonment in Nigeria for the same offenses for which he is presently imprisoned in the United States, does not render his conviction or prison sentence constitutionally infirm. See Chukwurah v. United States, 813 F. Supp. 161, 167 (E.D.N.Y. 1993). "It is well established that the 'double jeopardy clause's protection only applies in instances where the same sovereign is responsible for the successive prosecutions.'" Id. (quoting United States v. Giovanelli, 945 F.2d 479, 491 (2d Cir. 1991)). "In applying the [so-called] dual sovereignty doctrine, . . . the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the two entities draw their authority to punish the offender from distinct sources of

power." Heath v. Alabama, 474 U.S. 82, 88 (1985) (citations omitted). Because the United States and Nigeria "derive their powers to prosecute from independent sources of authority," id. at 90, both may prosecute Petitioner for the same offense in successive prosecutions without offending double jeopardy principles. See Chukwurah v. United States, 813 F. Supp. at 167 (citing Vasquez v. United States, No. 88 Civ. 1388, 1989 WL 38311, at * 1 (E.D.N.Y. 1989)).

Inufele also contends that his status as a deportable alien increases the severity of his confinement and qualifies him for downward departure. Amended Brief in Support of Movant's Motion Under 28 U.S.C. § 2255 at 5. As the Second Circuit has stated: "On the one hand, there is no doubt that in some cases deportation may cause substantial hardship. On the other hand, the . . . reduction of the prison term in recognition of those hardships does not eliminate the hardships or make the effects less harsh; rather, it advances the day when deportation will occur." United States v. Restrepo, 999 F.2d 640, 647 (2d Cir.), cert. denied, 510 U.S. 954 (1993). Moreover, Petitioner relinquished his right to make a downward departure motion as part of his plea bargain. Therefore, Petitioner's second argument is also without merit.

II. Ineffective Assistance of Counsel.

Finally, Inufeles contends that his Sixth Amendment right to effective assistance of counsel was violated. Although this claim was not raised on direct appeal, "ineffective assistance of counsel claims are appropriately brought in § 2255 petitions even if overlooked on direct appeal because resolution of such claims often requires consideration of matters outside the record on direct appeal." Billy-Eko v. United States, 8 F.3d 111, 114 (2d Cir. 1993) (citation omitted).

In order to prove ineffective assistance of counsel, Petitioner must: (1) demonstrate that his counsel's performance "fell below an objective standard of reasonableness" and (2) "affirmatively prove prejudice" by showing that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 693, 694 (1984). Thus, this Court must "determine, whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id. at 690. In adjudicating a matter of ineffectiveness of counsel, however, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. This Court must "indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance[.]” Id. 466 U.S. at 689.

In advising Inufeale to accept the Government's plea offer, counsel acted within the scope of reasonable professional judgment. It was uncontroverted that Inufeale had been caught transporting approximately two kilograms of heroin into the United States, and that he conceded to his guilt in an executed post-arrest statement. For these acts, Inufeale faced a mandatory minimum prison sentence of at least ten years. Therefore, counsel's recommendation that he plead guilty and accept the Government's plea agreement, which carried only a five-year prison term, can be characterized as sound legal advice “within the range of competence demanded of attorneys in criminal cases.”

McMann v. Richardson, 397 U.S. 759, 771 (1970). The plea agreement afforded Inufeale the minimum sentence permitted by law. Counsel accordingly fulfilled his role as advocate by ensuring that the adversarial process maintained its character and yielded a just result as guaranteed by the Sixth Amendment of the Constitution. See United States v. Cronic, 466 U.S. 648, 656-57 (1984).

Inufeale also contends that his counsel erred when he failed to raise any double jeopardy claims on appeal. Because Inufeale's double jeopardy claims lack merit for the reasons set forth above, however, counsel's decision to

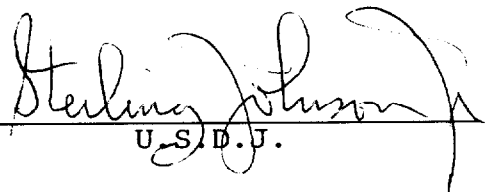
forego an appeal on those grounds was certainly reasonable. "A petitioner does not demonstrate ineffective assistance of counsel merely by pointing to issues which could have been raised by counsel on appeal, but were not." Villegas v. United States, No. 96 Civ. 149, 1997 WL 35510, at *6 (S.D.N.Y. Jan. 30, 1997). Accordingly, this Court concludes that counsel exercised objectively reasonable judgment under prevailing professional norms, and that Petitioner has failed to satisfy even the first prong of the Strickland v. Washington test to establish his ineffective assistance of counsel claim.

CONCLUSION

For the foregoing reasons, Inufeles's petition is hereby denied.

SO ORDERED.

Dated: Brooklyn, New York
May 19, 1997


U.S.D.J.